INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statute involved	2
Statement	2
1. Proceedings in the district court	2
2. Proceedings in the court of appeals	4
Summary of argument	5
Argument	10
I. The legislative context discloses no indication that Congress intended prisoners to be covered by the Tort Claims Act	12
II. Application of the Tort Claims Act to prisoner claims would undermine the uniform, federal character of the prison system	19
III. A holding that the Tort Claims Act applies to prisoner claims would subject the federal prison system to unwarranted judicial supervision	28
IV. To permit suit under the Tort Claims Act would interfere with prisoner discipline	37
Conclusion	42
Appendix	44

CITATIONS

Cases:	
Adams v. *Ellis*, 197 F. 2d 483	30
Banning v. *Looney*, 213 F. 2d 771, certiorari denied 348 U.S. 859	30
Berman v. *United States*, 170 F. Supp. 107	10, 27
Berry v. *Atlantic Coast Line*, 273 F. 2d 572	35
Brooks v. *United States*, 337 U.S. 49	13
Carder v. *Steiner*, 225 Md. 271, 170 A. 2d 220	37
Clearfield Trust Co. v. *United States*, 318 U.S. 363	24
Collins v. *United States*, No. T-1509, D. Kan., Jan. 29, 1958	10
Dalehite v. *United States*, 346 U.S. 15	13

Cases—Continued

	Page
Ellison v. *United States*, No. 1003, W.D.N.C., July 26, 1951	11
Feres v. *United States*, 340 U.S. 135	5, 11, 12, 13, 15, 19, 27, 28, 30, 31, 32, 35, 42
Federal Housing Administration v. *The Darlington, Inc.*, 358 U.S. 84	18
Fulwood v. *Clemmer*, 206 F. Supp. 370	30
Garcia v. *Steele*, 193 F. 2d 276	30
Golub v. *Kriminsky*, 185 F. Supp. 783	37
Golub v. *United States*, Civ. No. 148–117, S.D.N.Y., Oct. 5, 1959	10
Green v. *New York*, 278 N.Y. 15, 14 N.E. 2d 833	36
Henson v. *Welch*, 199 F. 2d 367	30
Indian Towing Co. v. *United States*, 350 U.S. 61	11, 12, 19
Ivanhoe Irrigation Dist. v. *McCracken*, 357 U.S. 275	24
James v. *United States*, 280 F. 2d 428, certiorari denied, 364 U.S. 845	10
Johansen v. *United States*, 343 U.S. 427	17
Jones v. *United States*, 249 F. 2d 864	10
Lack v. *United States*, 262 F. 2d 167	10
Lawrence v. *United States*, 193 F. Supp. 243	11
Numer v. *Miller*, 165 F. 2d 986	30
O'Hare v. *Jones*, 161 Mass. 391, 37 N.E. 371	36
Powell v. *Hunter*, 172 F. 2d 330	30
Rayonier, Inc. v. *United States*, 352 U.S. 315	11
Sarshik v. *Sanford*, 142 F. 2d 676	30
Sewell v. *Pegelow*, 291 F. 2d 196	30
Shew v. *United States*, 116 F. Supp. 1	10
Sigmon v. *United States*, 110 F. Supp. 906	10, 27
Stroud v. *Swope*, 187 F. 2d 850, certiorari denied, 342 U.S. 829	30
Sturm v. *McGrath*, 177 F. 2d 472	30
Thol v. *United States*, 218 F. 2d 12	17
Trostle v. *United States*, No. 1493, W.D. Mo., Feb. 20, 1956	10
Underwood v. *United States*, 207 F. 2d 862	17
United States v. *Brown*, 348 U.S. 110	11, 19, 37
United States ex rel. Collins v. *Heinze*, 219 F. 2d 233	30
United States v. *Gilman*, 347 U.S. 507	42
United States v. *Standard Oil Co.*, 332 U.S. 301	19, 42

Cases—Continued Page
Van Vuch v. *United States*, 118 F. Supp. 468 ..... 10, 27
Williams v. *Steele*, 194 F. 2d 32 30
Williams v. *United States*, 350 U.S. 857 24
Statutes:
Act of August 13, 1935, 49 Stat. 2132 14
Act of August 26, 1935, 49 Stat. 2182 14
Act of March 7, 1936, 49 Stat. 2233, 2234 14
Act of June 11, 1937, 50 Stat. 986 14
Act of June 15, 1937, 50 Stat. 993 14
Act of June 29, 1937, 50 Stat. 1011 14
Act of July 19, 1937, 50 Stat. 1036 14
Act of April 13, 1938, 52 Stat. 1293 14
Act of July 15, 1939, 53 Stat. 1473 14
Act of August 5, 1939, 53 Stat. 1501 14
Act of August 21, 1941, 55 Stat. 955 14
Act of November 21, 1941, 55 Stat. 971 14
Act of February 10, 1942, 56 Stat. 1101 14
Act of February 18, 1942, 56 Stat. 1112 14
Act of June 6, 1942, 56 Stat. 1180 14
Act of December 17, 1942, 56 Stat. 1244 14
Act of February 22, 1944, 58 Stat. 948 14
Act of May 29, 1944, 58 Stat. 982 14
Act of December 20, 1944, 58 Stat. 1070 14
Act of July 25, 1946, 60 Stat. 1264 14
Act of June 21, 1955, 69 Stat. A30 15
Act of June 29, 1956, 70 Stat. A97 15
Act of July 14, 1956, 70 Stat. A124 15
Act of September 14, 1960, 74 Stat. A101 15
Act of February 16, 1962, Pr. L. 87-293 ..... 15, 16
Act of February 16, 1962, Pr. L. 87-304 15
Federal Tort Claims Act:
28 U.S.C. 1346(b) 2, 12, 24, 44
28 U.S.C. 2674 ..... 2, 12, 44
28 U.S.C. 2680 12
Legislative Reorganization Act of 1946, 60 Stat. 831 (2 U.S.C. 190g):
§ 131 15
1 Stat. 96 20
4 Stat. 739, R.S. 5539 20
46 Stat. 272, now 18 U.S.C. 4201 22
46 Stat. 273, now 18 U.S.C. 4005 22

Statutes—Continued	Page
46 Stat. 325, 327, now 18 U.S.C. 4042	21
46 Stat. 326, now 18 U.S.C. 4082	22
46 Stat. 388, 390, now 18 U.S.C. 4081	21
46 Stat. 391	22
46 Stat. 391, now 18 U.S.C. 4125	22
48 Stat. 1211, 1212	14
48 Stat. 1211, now 18 U.S.C. 4121-4126	22
64 Stat. 854, 861, 5 U.S.C. 757	16, 17
75 Stat. 681, 18 U.S.C. (Supp. III) 4126	16
18 U.S.C. 4002	23
New York Civ. Prac. Act, § 60 (3)	36
Miscellaneous:	
Annotation, 14 A.L.R. 2d 353 (1950)	26
1957 Annual Report of the Attorney General 409	17
1958 Annual Report of the Attorney General 354	29
1961 Annual Report of the Attorney General 371	32
Bureau of Prisons, Manual Bulletin No. 96 (1944), p. 10	30
Bureau of Prisons, *Thirty Years of Prison Progress* (1961)	20
Department of Justice, Inmate Accident Compensation Regulations (Rev. September 1961), Reg. 5	16
Federal Penal and Reformatory Institutions, Hearings Before the Special Committee on Federal Penal and Reformatory Institutions, 70th Cong., 2d Sess	20
Federal Prisoners and Penitentiaries, Hearings Before House Committee on the Judiciary, 71st Cong., 2d Sess	20
Federal Prisons, 1945, p. 1	22
Federal Prisons, 1946, p. 18	32
Federal Prisons, 1947, p. 22	34
History of Legislation of the House Committee on Claims, 75th Cong., p. xiii	14
H. Doc. No. 176, 71st Cong., 2d Sess	21
H. Rep. No. 414, 75th Cong., 1st Sess	14
H. Rep. No. 658, 75th Cong., 1st Sess	14
H. Rep. No. 1904, 86th Cong., 2d Sess	16
H. Rep. No. 494, 87th Cong., 1st Sess	16
H. Rep. No. 534, 87th Cong., 1st Sess	16
Korn & McCorkle, *Criminology and Penology* (1959), 526	39

Miscellaneous—Continued

	Page
MacCormick, *Behind the Prison Riots*, 293 Annals 17 (1954)	39
National Prisoners Statistics, No. 30, August 1962, Table 6	25
Note, 34 Ind. L.J. 609	17
Note, 110 U. Pa. L. Rev. 985	30
Note, 72 Yale L.J. 506, 508	29
1960 Proceedings, American Correctional Association, Declaration of Principles XI, p. 486	28
Revisers' Note, 18 U.S.C. 4081	22
Rules, Subcommittee No. 2, House Committee on the Judiciary, 87th Cong., 1st Sess	14
S. Rep. No. 1976, 84th Cong., 2d Sess	16
Sutherland & Cressey, *Principles of Criminology* (6th ed. 1960):	
P. 475	38
P. 480–481	39
P. 501	29, 39
P. 505–506	29
Sykes, *The Society of Captives* (1958):	
Pp. 17–18	37
P. 21	38
Tappan, *Crime, Justice and Correction* (1960), pp. 614–619	26

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 464

UNITED STATES OF AMERICA, PETITIONER

v.

CARLOS MUNIZ AND HENRY WINSTON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

United States v. *Winston.* The memorandum opinion of the United States District Court for the Southern District of New York (R. 3) is not reported. The panel decision of the Court of Appeals for the Second Circuit (R. 4–20) is reported at 305 F. 2d 253. The opinion of the court of appeals on rehearing *en banc* (R. 24–60) is reported at 305 F. 2d 264.

United States v. *Muniz.* The opinion of the United States District Court for the Southern District of New York (R. 66) is not reported. The panel opinion of the United States Court of Appeals for the Second Circuit (R. 68–70) is reported at 305 F. 2d 285. The opinion of the court of appeals on rehearing *en banc* (R. 74–75) is reported at 305 F. 2d 287.

JURISDICTION

The judgments of the court of appeals, sitting *en banc*, were entered on June 28, 1962 (R. 62, 76). The petition for a writ of certiorari was filed on September 26, 1962, and was granted on December 3, 1962 (R. 77). In both cases, the jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Federal Tort Claims Act applies to claims by federal prisoners for damages for personal injuries sustained as an incident to confinement and allegedly caused by the negligence of federal prison personnel.

STATUTE INVOLVED

The pertinent provisions of the Federal Tort Claims Act, 28 U.S.C. 1346(b) and 2674, are set forth in Appendix A, *infra*, p. 44.

STATEMENT

1. Proceedings in the district court. Respondents filed these two suits against the United States under the Federal Tort Claims Act, 28 U.S.C. 1346(b), claiming that, while held as federal prisoners, they suffered personal injuries as a result of negligence by officers and employees of the federal institutions in which they were confined. The United States moved to dismiss on the ground that the Act does not authorize suits by federal prisoners for damages resulting from the negligence of prison officers and employees (R. 3, 66). The facts alleged in the complaints are as follows:

Carlos Muniz, a resident of New York, was confined in the federal correctional institution at Danbury, Connecticut, under sentence of a federal court. On August 24, 1959, he was struck by other inmates of the institution, twelve of whom pursued him into a dormitory. The dormitory was then locked by one of the guards in the institution. The other inmates beat Muniz into unconsciousness, causing him severe injuries, including a skull fracture and loss of vision in his right eye. He brought this suit against the United States under the Federal Tort Claims Act alleging that his injuries were caused by negligent operation of the prison in that there were insufficient guards to prevent the incident, and in that mentally and physically abnormal prisoners were permitted to mingle with others without adequate and proper supervision. He claims damages of $250,000. (R. 64, 65).

Henry Winston, a resident of New York, was held as a federal prisoner in the United States Penitentiary in Terre Haute, Indiana. In April 1959 he claimed to suffer from dizziness, instability and difficulty with vision. At the request of his attorney, he was examined by medical officers on the staff of the Terre Haute Penitentiary. These officers made a diagnosis of borderline hypertension, for which they prescribed a reduction in weight. Plaintiff continued to experience severe headaches, dizziness and instability, which led him to fall down when he attempted to walk. He also began to suffer periodic loss of vision. He complained of these symptoms to officers and employees at

the penitentiary but, except for the administration of dramamine pills, they did not give him further medical attention. In January 1960, at the insistence of his attorney, Winston was hospitalized in Terre Haute and in February was operated on in New York for the removal of a benign tumor of the cerebellum. While still in custody, Winston brought suit against the United States under the Federal Tort Claims Act, alleging that the medical officers who had examined him in 1959 had failed to use reasonable care and skill and had negligently diagnosed his condition; that personnel of the prison wilfully and negligently failed to give him medical attention despite his symptoms; and that as a result of these negligent and wilful acts he became permanently blind. He claims damages of one million dollars. (R. 1–3).

In both cases the district court held that the Tort Claims Act does not authorize suit by federal prisoners for injuries sustained as a result of alleged negligence by prison officers and employees and dismissed the complaints for failure to state a claim upon which relief could be granted (R. 3, 66).

2. *Proceedings in the court of appeals.* A panel of the Court of Appeals for the Second Circuit, speaking through Judge Hincks (joined by Clark, J.), reversed both judgments; Judge Kaufman dissented. The main opinions were delivered in the *Winston* case (R. 24–60) and were held to be dispositive in the *Muniz* case (R. 68–70). On motion of one of its judges, the court ordered the cases reheard (without argument) *en banc*. In an opinion by Judge Hays (joined by Clark, Waterman, Smith and Marshall,

JJ.), the court adopted Judge Hincks' original opinion and developed certain additional considerations (R. 24–40). Judge Kaufman (joined by Lumbard, C.J., and Moore and Friendly, JJ.) dissented (R. 40–60). As before, the main opinions dealt with the *Winston* case and were dispositive in the *Muniz* case (R. 74–75).

SUMMARY OF ARGUMENT

In holding that federal prisoners may bring suit under the Federal Tort Claims Act for injuries incident to their confinement, the court below departed from the uniform course of decision in the federal courts. It also departed from the principles on which those prior decisions were based, principles laid down by this Court in *Feres* v. *United States*, 340 U.S. 135, and still valid today. There, this Court held that, because of the unique and federal character of the relationship between soldiers and their government, Congress could not be assumed to have intended that soldiers be allowed to bring suit under the Tort Claims Act for service-connected claims. The considerations that compelled that result are fully applicable to prisoner claims as well.

I

While neither the face of the Tort Claims Act nor its history discloses a clear legislative purpose, the surrounding circumstances negate the likelihood that Congress intended the Act to embrace claims by federal prisoners. First, although the Act was passed in order to relieve Congress of the burden of considering bills for private relief, the volume of private

acts for prisoners had never been large. Second, prisoner relief by way of private act had been considered as a form of workmen's compensation and not as ordinary tort relief. Third, there was already in effect an administrative scheme to compensate prisoners for some injuries incident to confinement.

Moreover, subsequent actions by Congress indicate that Congress did not intend the Tort Claims Act to cover prisoner claims. Although private bills may not be considered for claims covered by the Act, Congress has continued to consider and pass private legislation for prisoner claims. And it has broadened the administrative compensation scheme so that it now comprehends all prisoner injuries arising out of work activity, thus covering the area of prisoner life most likely to produce tort claims. Furthermore, committees of Congress have repeatedly stated that prisoners have no judicial remedy for their tort claims.

These factors in the legislative context, all of which are entitled to weight, indicate that Congress did not intend the Tort Claims Act to embrace claims by federal prisoners. In addition, there are a number of important practical considerations which compel the conclusion that the Act cannot be assumed to cover such claims in the absence of express congressional mandate.

II

First, the application of the Tort Claims Act to prisoner claims would undermine the uniform, federal character of the prison system. Prior to 1930,

the federal prison system was operated without any effective centralized control or policy guidance; each institution was virtually autonomous. Moreover, because of insufficient capacity, more than half of the federal prisoners were housed in state institutions, beyond the control of federal correctional authorities. In 1930, Congress passed a series of statutes designed to bring about the development of a uniform, federally controlled prison system for federal offenders. On the basis of this legislation, the Bureau of Prisons has developed such a system.

Application of the Tort Claims Act to prisoner claims would subject the prison system to the divergent laws of the States in which prison facilities are located, since the law of the State in which the tortious conduct occurs applies in Tort Claims Act suits. Such subjection to state standards of care would detract from federal responsibility and control over the system. And the fact that the system would be governed by the divergent laws and standards of the 24 States in which its facilities are located would seriously undermine the integrated character of the system.

III

Second, a holding that the Tort Claims Act applies to prisoner claims would subject the federal prison system to unwarranted judicial supervision. Prison administration is recognized as one of the most complex areas of public administration. The necessity of regulating every aspect of the inmates' lives and the fact that the inmates resist every facet of such regu-

lation present administrative problems so extreme that the courts have repeatedly concluded that they should refrain from exercising supervision over the internal management of the federal penal system.

An important basis for this judicial restraint is, no doubt, the fact that the conduct of prison authorities cannot be measured against the standards which judges are accustomed to apply to other segments of the community. This is clearly so where the negligence charged (as in the *Muniz* case) goes to the maintenance of security and internal order in a prison. It is hardly less true with respect to conduct having some counterpart in private life, such as the negligent medical treatment charged in the *Winston* case, for the practice of medicine in a prison is pervasively complicated by requirements of security and internal order. In short, the context of a prison system cannot be translated into terms that make it susceptible of intelligent appraisal by courts unfamiliar with penal methods and conditions.

Furthermore, judicial supervision would interfere with the administration of the prison system. The standards of care adopted by the judges will affect the manner in which prison officials perform their duties, whether or not they conform with the officials' best judgment as to what is dictated by sound penal policy. The litigation in open court of the details of prison administration (such as emergency plans and guard assignments) could well pose a serious threat to prison security. And the burden on prison officials of defending against prisoner suits would be substantial.

IV

Third, it would undermine prisoner discipline to allow federal prisoners to bring Tort Claims Act suits. Firm discipline is extremely important to the accomplishment of penal objectives, not only prison order and security but also rehabilitation of prisoners. However, effective prison discipline is extremely difficult to achieve, largely because of the hostility of the inmates and the tense atmosphere inevitably attending confinement.

The delicate task of maintaining humane discipline would be made much more difficult if prisoners were free to harass their custodians with Tort Claims Act suits. The authority of a prison official is undermined by entanglement in litigation with a prisoner. Moreover, such litigation, which would be followed closely by the plaintiff's fellow prisoners, could contribute greatly to the tensions of prison life. Finally, disciplinary conduct itself might well provide a basis for prisoner suits, providing an incentive for prisoners to resist discipline and inhibiting the officers imposing it.

This Court has previously recognized that the extension of tort liability into areas not expressly considered by Congress should not be accomplished by judicial action. The considerations that have led to that conclusion apply fully to the question whether the unique relationship between federal prisoners and the United States should be complicated by the availability of suits against the government for injuries incident to confinement. Until Congress has given

express consideration to the kind of remedies prisoners should have, courts are not justified in attributing to it an intent that they should be covered by the Tort Claims Act.

ARGUMENT

These two Federal Tort Claims Act suits arise out of injuries allegedly incurred by federal prisoners, incident to their confinement, as a result of the negligence of prison personnel. The negligence charged by respondent Winston is that prison medical officers negligently failed to diagnose and to treat a condition that, because untreated, led to his blindness. Respondent Muniz charged that he was injured in the course of a disorder among prisoners which the prison authorities negligently failed to prevent. In both cases the district courts dismissed the complaints as outside the scope of the Tort Claims Act, but the court of appeals held that they came within the Act.

In so ruling, the court below departed from the uniform course of the decisions in federal courts. Every court that had passed upon the problem had concluded, without exception, that the Act was not intended to apply to suits by federal prisoners complaining of injuries incident to their status as prisoners.[1] This consistent line of decisions was based

[1] *James* v. *United States*, 280 F. 2d 428 (C.A. 8), certiorari denied, 364 U.S. 845; *Lack* v. *United States*, 262 F. 2d 167 (C.A. 8); *Jones* v. *United States*, 249 F. 2d 864 (C.A. 7); *Berman* v. *United States*, 170 F. Supp. 107 (E.D.N.Y.); *Golub* v. *United States*, Civ. No. 148-117, S.D.N.Y. (Oct. 5, 1959); *Collins* v. *United States*, No. T-1509, D. Kan. (Jan. 29, 1958); *Trostle* v. *United States*, No. 1493, W.D. Mo. (Feb. 20, 1958); *Van Zuch* v. *United States*, 118 F. Supp. 463 (E.D.N.Y.); *Shew* v. *United*

largely upon this Court's decision in *Feres* v. *United States*, 340 U.S. 135, holding that the Act is not applicable to claims by military personnel for injuries incident to their service, notwithstanding the fact that Congress did not expressly except military claims from the broad terms of the Act.

The *Feres* case turned on the peculiar status and conditions attending the exclusively federal relationship between military personnel and the United States. See *Feres* v. *United States*, *supra*, 340 U.S. at 146; *United States* v. *Brown*, 348 U.S. 110, 112. Finding no indication that Congress affirmatively intended suits for service-connected injuries to be covered by the Tort Claims Act, the Court concluded that the allowance of suits would have such a seriously adverse impact on the special military relationship that Congress could not be assumed to have intended such a result.

This approach has not been modified (as the court below intimated, see R. 7–9) by this Court's subsequent decisions in *Indian Towing Co.* v. *United States*, 350 U.S. 61, and *Rayonier, Inc.* v. *United States*, 352 U.S. 315. Those cases did not involve an inquiry into the consequences attaching to a unique relationship between the injured persons and the United States. They focused on the nature of the claims involved

---

States, 116 F. Supp. 1 (M.D.N.C.); *Sigmon* v. *United States*, 110 F. Supp. 906 (W.D. Va.); *Ellison* v. *United States*, No. 1003, W.D.N.C. (July 26, 1951). Cf. *Lawrence* v. *United States*, 193 F. Supp. 243, 245 (N.D. Ala.) (recovery allowed where prisoner was injured as a result of negligence of employee of Air Force who was "completely disassociated from his [the prisoner's] status").

677305—63——3

(negligent operation of a lighthouse and negligent conduct of fire-fighting activities) and simply held that exceptions to the Act could not be implied from the "uniquely governmental" nature of the negligent conduct alleged. Indeed, the *Feres* case was distinguished precisely because it turned upon the special relationship of military personnel to the government (*Indian Towing Co.* v. *United States, supra*, 350 U.S. at 69).

As we shall show, this approach requires the same result as that reached in the *Feres* case when applied to the special relationship between federal prisoners and the United States. The considerations on which the Court based its *Feres* decision are, we believe, fully applicable to prisoners. Accordingly, the Federal Tort Claims Act should be held inapplicable to suits for injuries which are incident to the injured person's status as a federal prisoner.

I. THE LEGISLATIVE CONTEXT DISCLOSES NO INDICATION THAT CONGRESS INTENDED PRISONERS TO BE COVERED BY THE TORT CLAIMS ACT

The face of the Federal Tort Claims Act discloses no clear purpose on the part of Congress either to include or to exclude prisoner claims. It is true that the language of the Act is broad (28 U.S.C. 1346(b), 2674) and that Congress did not list prisoner claims among the express exceptions (28 U.S.C. 2680). This Court has recognized, however, that these considerations are not determinative, especially where the results of coverage would be "so outlandish" that Congress could not be assumed to have intended them. See

Brooks v. *United States*, 337 U.S. 49, 53. Thus, in *Feres* v. *United States*, 340 U.S. 135, the Court held the Act inapplicable to claims for injuries incident to military service, even though the Act contains an express exclusion for some types of claims arising out of military service but does not generally except claims for injuries incident to such service; the Court concluded—for reasons that are equally applicable to prisoner claims (see pp. 19–41, *infra*)—that coverage of military claims would have such extreme results that it could not be assumed "in the absence of express congressional command" (340 U.S. at 146).

Nor does the legislative history of the Act clearly resolve the issue. As with respect to military claims, so here, "There are few guiding materials for our task of statutory construction. No committee reports or floor debates disclose what effect the statute was designed to have on the problem before us, or that it even was in mind." *Feres* v. *United States*, *supra*, 340 U.S. at 138. However, a number of circumstances in the legislative context of the Federal Tort Claims Act tend to negate the likelihood that Congress intended the Act to embrace claims by federal prisoners.

A primary purpose of the Federal Tort Claims Act was to relieve Congress of the burden of considering "the mass of claims" based on allegedly tortious acts by government officers and employees for which it was asked to enact private relief. See *Dalehite* v. *United States*, 346 U.S. 15, 24–25. However, "Congress was suffering from no plague of private bills" on behalf of federal prisoners (cf. *Feres* v. *United States*, *supra*, 340 U.S. at 140); only two or three were passed

each session.[2] And those few claims were not considered as ordinary tort claims; for example, the standing policy of the House Committee on Claims was to treat such relief as a form of workmen's compensation governed by "modern law, eliminating the common-law bars to recovery such as contributory negligence and the fellow servant rule."[3] This policy remained in effect after the passage of the Tort Claims Act, and is still the guiding policy for the disposition of private bills to compensate prisoner injuries.[4]

Furthermore, there was already on the statute books an administrative compensation scheme covering injuries suffered by prisoners in Federal Prison Industries. The Act provided that such compensation should be paid at the discretion of the Attorney General, but not "in a greater amount than that provided in the Federal Employees' Compensation Act * * *." 48 Stat. 1211, 1212. That provision remained in effect

---

[2] *E.g.*, Act of August 13, 1935, 49 Stat. 2132; Act of August 26, 1935, 49 Stat. 2182; Act of March 7, 1936, 49 Stat. 2233; Act of March 7, 1936, 49 Stat. 2234; Act of June 11, 1937, 50 Stat. 986; Act of June 15, 1937, 50 Stat. 993; Act of June 29, 1937, 50 Stat. 1011; Act of July 19, 1937, 50 Stat. 1036; Act of April 13, 1938, 52 Stat. 1293; Act of July 15, 1939, 53 Stat. 1473; Act of August 5, 1939, 53 Stat. 1501; Act of August 21, 1941, 55 Stat. 955; Act of November 21, 1941, 55 Stat. 971; Act of February 10, 1942, 56 Stat. 1101; Act of February 18, 1942, 56 Stat. 1112; Act of June 6, 1942, 56 Stat. 1180; Act of December 17, 1942, 56 Stat. 1244; Act of February 22, 1944, 58 Stat. 948; Act of May 29, 1944, 58 Stat. 982; Act of December 20, 1944, 58 Stat. 1070; Act of July 25, 1946, 60 Stat. 1264.

[3] *History of Legislation of the House Committee on Claims*, 75th Cong., p. xiii. See also H. Rep. No. 658, 75th Cong., 1st Sess., p. 2; H. Rep. No. 414, 75th Cong., 1st Sess., p. 2.

[4] See *e.g.*, Rules of Subcommittee No. 2, House Committee on the Judiciary, 87th Cong., 1st Sess., p. 31.

after the passage of the Tort Claims Act and, as we point out below, has since been substantially expanded. These circumstances—the low volume of prisoner claims, the fact that such claims were not treated as ordinary tort claims, and the fact that at least a limited compensation scheme for prisoner injuries already exisited—militate against any conclusion that Congress intended to cover prisoner claims in the Tort Claims Act. See *Feres* v. *United States, supra,* 340 U.S. at 140, 144.

That such was not the purpose of Congress has been confirmed by its subsequent activity in this area. In Section 131 of the Legislative Reorganization Act of 1946 (of which the Tort Claims Act was a part), Congress provided that "No private bill * * * authorizing or directing * * * the payment of money for property damages, for personal injuries or death for which suit may be instituted under the Federal Tort Claims Act * * * shall be received or considered in either the Senate or the House of Representatives" (60 Stat. 831, now 2 U.S.C. 190g). Thus, when Congress considers a private compensation bill, it must determine as a matter of law whether the claim is within the jurisdiction of the courts. Congress has manifested its considered judgment that prisoner claims are not covered by the Tort Claims Act—not only by passing a number of private bills for the relief of persons injured while inmates of federal prisons,[5] but

[5] See, *e.g.*, Act of June 21, 1955, 69 Stat. A 30; Act of June 29, 1956, 70 Stat. A97; Act of July 14, 1956, 70 Stat. A124; Act of September 14, 1960, 74 Stat. A101; Act of February 16, 1962, Pr. L. 87-293; Act of February 16, 1962, Pr. L. 87-304.

also by express statements in legislation and legislative reports denying the existence of such coverage.[6]

Moreover, Congress has expanded the administrative compensation scheme for the relief of injuries suffered by prisoners. In 1961, it enlarged the coverage of that program to include injuries suffered "in any work activity in connection with the maintenance or operation of the institution where confined," in addition to those suffered in prison industries. 75 Stat. 681, 18 U.S.C. (Supp. III) 4126.[7] The House Report noted that compensation under this scheme was to be no greater than that allowed by the Federal Employees' Compensation Act and declared (H. Rep. No. 534, 87th Cong., 1st Sess., pp. 2–3):

> Presently there is no way under the general law to compensate prisoners injured [while working in connection with the maintenance and operation of the institution where they are confined]. Their only recourse has been to appeal to Congress * * *

While this compensation scheme does not cover every aspect of prisoner life, it does cover the one area in which the vast majority of prisoners[8] spend the

---

[6] See, *e.g.*, Pr. L. 87–293; S. Rep. No. 1976, 84th Cong., 2d Sess., p. 2; H. Rep. No. 1904, 86th Cong., 2d Sess., p. 2; H. Rep. No. 494, 87th Cong., 1st Sess., p. 2.

[7] The regulations provide for the payment of compensation after the inmate's discharge if, at that time, he is permanently or partially disabled. U.S. Dept. of Justice, Inmate Accident Compensation Regulations (rev. Sept. 1961), Reg. 5.

[8] Approximately 90 percent of the federal inmate population is employed in work that is now covered by the compensation scheme; the others are persons who normally cannot be employed because of illness, physical or mental disability and

greatest part of their waking time and which is most likely to give rise to injuries—work in prison industries or institutional maintenance and operation.*

It seems clear that Congress intended this compensation program to be the exclusive remedy for prisoner injuries (except for the possibility that any glaring inequities might still be remedied by private legislation). Congress has been at pains to emphasize that compensation under the program is to be no greater than compensation under the Federal Employees' Compensation Act—and, of course, the latter scheme is an exclusive one, precluding recourse on the part of federal employees to the Federal Tort Claims Act on account of injuries sustained in the course of their employment, see *Johansen* v. *United States*, 343 U.S. 427, 436; 64 Stat. 854, 861, 5 U.S.C. 757; moreover, even if a particular claim based on employment-related injuries is not within the coverage of the FECA, it cannot be asserted in a Tort Claims Act suit. *Underwood* v. *United States*, 207 F. 2d 862 (C.A. 9); *Thol* v. *United States*, 218 F. 2d 12 (C.A. 9). It would not be reasonable to suppose that Congress intended prisoners to have a judicial remedy that is unavailable to federal employees and military personnel injured in the course of their employment or service.

---

age, or because they are in the process of admission, release or transfer. 1957 Ann. Rep. Att'y Gen. 409.

* We note that in the one State—New York—that clearly allows prisoner suits against the State itself (see pp. 35–36, *infra*), most of the claims are for work-related injuries. See Note, 34 Ind. L.J. 609, 611.

The fact that some of the foregoing circumstances took place after the passage of the Tort Claims Act—such as Congress' continued passage of private bills for prisoners and the continued policy of treating prisoners' claims as workmen's compensation, the declarations in committee reports that there was no judicial remedy and the expansion of the administrative compensation scheme—does not deprive them of significance in construing the statute. This Court has observed that "[s]ubsequent legislation which declares the intent of an earlier law is not, of course, conclusive in determining what the previous Congress meant. But the later law is entitled to weight when it comes to the problem of construction." *Federal Housing Administration* v. *The Darlington, Inc.*, 358 U.S. 84, 90. Where, as here, the subsequent history confirms the limited but persuasive contemporaneous indications of congressional purpose, we believe it entitled to considerable weight.

All of the foregoing factors point to the conclusion that Congress did not propose to cover claims by prisoners for injuries suffered incident to their confinement. In addition, there are a number of very important practical considerations, which we discuss in the following sections, that make it clear that Congress could not have contemplated such a result: that such coverage would undermine the uniform, federal character of the prison system; that it would subject the administration of that system to unwarranted judicial supervision; and that it would seriously interfere with prison discipline. These considerations,

we submit, compel the conclusion that the Federal Tort Claims Act cannot be assumed to cover prisoner claims "in the absence of express congressional command" (*Feres* v. *United States, supra,* 340 U.S. at 146).

II. APPLICATION OF THE TORT CLAIMS ACT TO PRISONER CLAIMS WOULD UNDERMINE THE UNIFORM, FEDERAL CHARACTER OF THE PRISON SYSTEM

In holding that military personnel could not proceed under the Federal Tort Claims Act for injuries incident to their service, *Feres* v. *United States,* 340 U.S. 135, the Court placed great emphasis on the fact that the relationship between the soldier and his superiors is "distinctively federal in character" (340 U.S. at 143, quoting *United States* v. *Standard Oil Co.,* 332 U.S. 301, 305), and that Congress has never deviated from the view that it is to be "governed exclusively by federal law" (340 U.S. at 146); the Court also recognized that the character of the military establishment is such that it must be regulated and administered uniformly (340 U.S. at 142-143, 144. See, also, *United States* v. *Brown,* 348 U.S. 110, 112; *Indian Towing Co.* v. *United States,* 350 U.S. 61, 69. No less uniquely federal in character is the relationship between the federal prisoner and his custodians, and it is indisputable that Congress intended the federal prison system to be operated in a uniform manner, subject only to federal regulation. To allow prisoners to bring suits under the Tort Claims Act for injuries incident to their confinement would, we submit, derogate from uniformity and from federal control of the system.

For the first century under the Constitution, there was no federal penal system.[10] Federal offenders were placed in state institutions, subject to the full control of state authorities acting under state law; the federal government simply paid a boarding fee. See 1 Stat. 96; 4 Stat. 739, R.S. 5539. This policy became increasingly unsatisfactory as the number of federal offenders grew and as the States, burdened with their own problems of administration, began to refuse federal prisoners or to charge exorbitant boarding fees.

Finally, in 1895, the first federal penal institution was established at Fort Leavenworth, Kansas. Thereafter, the federal prison system grew piecemeal. By 1929 there were six facilities: three penitentiaries, a reformatory for men and one for women, and a detention headquarters. Each warden administered his facility almost independently, and there was no effective centralized control or guidance. Moreover, because the system had inadequate capacity, more than half of the federal prisoners were still being housed in state and county institutions. Statutory policy governing federal prisoners was inconsistent and confused. There was no clear mandate concerning the assignment

---

[10] The historical material in this and the following paragraphs was largely derived from the following sources: *Federal Penal and Reformatory Institutions*, Hearings before Special House Committee on Federal Penal and Reformatory Institutions, 70th Cong., 2d Sess.; *Federal Prisoners and Penitentiaries*, Hearings before House Committee on the Judiciary, 71st Cong., 2d Sess.; U.S. Bureau of Prisons, *Thirty Years of Prison Progress* (1961); Annual Reports, U.S. Bureau of Prisons, *passim*.

of prisoners as among federal, or as between state and federal facilities. There was no uniform correctional policy or rehabilitation program. Federal prisoners in state institutions were not subject to any form of control by the federal prison authorities. Conditions and policies in the federal facilities were far from satisfactory.

By the late nineteen twenties it was becoming apparent that federal penal policy and institutions were grossly inadequate. Beginning in 1928 considerable attention was focused on the problem throughout the government; detailed hearings on the federal prison system were held before a special House committee; a special report was made to the Attorney General recommending a comprehensive program for the confinement and maintenance of prisoners; President Hoover sent a message to Congress requesting the establishment of a central agency to supervise the federal prisons (H. Doc. No. 176, 71st Cong., 2d Sess.); and a series of bills was introduced in Congress with a view to instituting a comprehensive federal program for the treatment of federal prisoners.

This activity culminated in the passage, in 1930, of several statutes that formed the foundation for a modern federal prison system. Congress created the Bureau of Prisons within the Department of Justice, charging it with the management and regulation of all federal penal and correctional institutions (46 Stat. 325, 327, now 18 U.S.C. 4042) under a uniform federal policy (46 Stat. 388, 390, now 18 U.S.C. 4081):

> The Federal penal and correctional institutions shall be so planned and limited in size as

> to facilitate the development of an integrated system which will assure the proper classification and segregation of Federal prisoners according to the nature of the offenses committed, the character and mental condition of the prisoners, and such other factors as should be considered in providing an individualized system of discipline, care, and treatment of the persons committed to such institutions."[11]

A central Board of Parole was created (46 Stat. 272, now 18 U.S.C. 4201); provision was made for the furnishing of medical, psychiatric and scientific services to prisoners (46 Stat. 273), now 18 U.S.C. 4005); a program of industrial employment was established (46 Stat. 391, superseded by the Federal Prison Industries program, 48 Stat. 1211, now 18 U.S.C. 4121–4126); and minimum-security work camps were authorized (46 Stat. 391, now 18 U.S.C. 4123). All prisoners were to be committed to the custody of the Attorney General, who was authorized to assign them and to transfer them between institutions (46 Stat. 326, now 18 U.S.C. 4082).

Spurred by the congressional policy expressed in the 1930 reforms, the newly established Bureau of Prisons set about the creation of an independent, integrated federal correctional program. New facilities were built and existing facilities improved to the point where today there are 31 modern federal penal insti-

---

[11] This policy, originally enacted in legislation concerning only two institutions, was applied to the entire system. *Federal Prisons, 1945*, p. 1. Its language was changed in the 1948 revision of the Criminal Code to reflect "the manifest intent of Congress." Revisers' Note, 18 U.S.C. 4081.

tutions: 7 penitentiaries (of which one is under construction), 9 correctional institutions, 3 reformatories for men and 1 for women, 5 institutions for juveniles and youths, 6 prison camps, 1 medical center and 1 detention headquarters; there are also 2 experimental pre-release guidance centers. With the expansion of facilities, it became possible to initiate a system for the classification of prisoners according to security requirements and need for treatment. Comprehensive and progressive rehabilitation and work programs were instituted. Although the facilities were diversified, the system as a whole rapidly developed—as Congress plainly intended—into an integrated correctional program, administered according to federal law and federal policies.

An important factor in the development of an integrated federal system was the abandonment of any substantial use of state and local prison facilities. Such facilities have come to be used by the federal prison system principally as jails—*i.e.*, as places where prisoners are held for trial, for sentence following conviction or for the service of terms too short to permit effective treatment in the federal prison system. State institutions are designated for long-term prisoners only in special cases, such as where there are concurrent state and federal sentences or, in the case of women and juveniles, when considerations of compassion or treatment warrant confinement near the offender's home. The handling of federal prisoners in non-federal institutions is wholly controlled by federal contracts authorized under 18 U.S.C. 4002, which incorporate federal policy and regulations gen-

erally applicable to all federal prisoners and which, of course, are governed by federal law. *Ivanhoe Irrigation Dist.* v. *McCracken*, 357 U.S. 275, 289; *Clearfield Trust Co.* v. *United States*, 318 U.S. 363. During the year ending June 30, 1961, an average of only 2,658 federal prisoners were confined in state, county, city and private facilities, out of an average total of 27,560 federal prisoners.

The foregoing historical survey demonstrates what scarcely requires proof: that Congress envisioned the development and maintenance of a uniform, federally controlled prison system for federal offenders, and that such a system has, in fact, been painstakingly constructed. Nor does it seem open to serious question that to allow prisoners to press claims under the Federal Tort Claims Act for injuries incident to their confinement in that system would undermine both its uniformity and its federal character. The principal reason for this is that the Tort Claims Act makes federal liability turn on the law of the State in which the allegedly negligent conduct took place (28 U.S.C. 1346(b)). This incorporation of the *lex loci delicti* requires the courts to refer to local law in determining whether a tortious and actionable wrong has been committed. *Williams* v. *United States*, 350 U.S. 857.

Thus, presumably, liability on the basis of acts or omissions by the administrators of a particular federal prison facility would depend upon the standard of due care prevailing in the State in which the facility is located (see R. 36–38). Judge Kaufman suggested the problems presented by such subjection to state standards: "If Georgia and Kansas have a guard ratio

of 10 to 1, is it *prima facie* negligence for Atlanta and Leavenworth to have, e.g., a 30 to 1 ratio?" (R. 94, n. 13). The same potential of divergencies between state and federal standards could exist in such areas as construction standards, kitchen facilities, classification systems, security precautions and emergency procedures, to name but a very few. The problem is not, of course, that the federal prison system might be held to an unattainably high standard. It is that the federal facility would be held to a standard reflecting a system entirely different from that of which the federal facility is an integral part—one probably differing in size,[12] in diversification, in the magnitude of its disciplinary and security problems, perhaps in its whole conception of the way in which prisoners should be treated. To judge federal prison authorities by such standards cannot but undermine federal responsibility and control over the federal prison system.

Even more important, of course, is the fact that the federal prison system would be subjected to the divergent standards of the 24 States in which its facilities are located.[13] Just as there are wide variations in

[12] Only California handles as many prisoners as the federal system, although it does so in a much smaller number of institutions. Inmate population in other States varied in 1961 from 191 in New Hampshire to 17,569 in New York. National Prisoners Statistics, No. 30, August 1962, table 6.

[13] Alabama, Arizona, California, Colorado, Connecticut, District of Columbia, Florida, Georgia, Illinois, Indiana, Kansas, Kentucky, Michigan, Minnesota, Missouri, New York, Ohio, Oklahoma, Pennsylvania, South Carolina, Texas, Virginia, Washington, West Virginia.

prison population among the States,[14] so do state prison systems differ widely from one another in most other aspects of their penal systems, reflecting such variables as local crime conditions, urban concentration, local attitudes toward correctional problems, etc. See Tappan, *Crime, Justice and Correction* (1960), pp. 614–19. Moreover, as the court below recognized (R. 38), because of variations in the tort law of the several States as to what kinds of conduct give rise to a cause of action, certain acts or omissions by prison officials may be actionable in some jurisdictions but not in others.[15] To subject the federal prison system to the divergencies in standards of due care and actionability among the States in which its facilities have been placed—and placed, of course, without regard to the vagaries of local law—would plainly defeat the integrated nature of the system.

If federal prison officials are judged in Tort Claims Act suits by standards that differ from federal penal standards and differ from place to place, it is inevitable that, to some extent at least, they will adjust their conduct accordingly. Each of them will be forced to carry out his functions with one eye on what the tort law of the State in which he performs his work would expect of him. Such a process cannot help but have

---

[14] See note 12, *supra*.

[15] In this connection it should be noted that some States recognize the liability of custodial authorities for negligent treatment of prisoners, while others do not. See Annotation, 14 A.L.R. 2d 353, 356 (1950). Since this circumstance would determine the prisoner's right to sue under the Tort Claims Act (see note 27, *infra*), the possibility of anomalous divergencies is apparent.

an effect on both the uniformity and the federal control that have so carefully developed in the federal prison system, at the direction of Congress and under the guidance of the Bureau of Prisons. It cannot help but bring about a retreat toward the confused and directionless situation that prevailed in the federal prison system prior to 1930. We submit that Congress could not have intended such a result.

It should also be noted that this Court, in refusing to find the Tort Claims Act applicable to military claims, stressed the point that it would not be "rational" to make the law of the place of the injury applicable to one, such as the soldier on duty, who has no control over his location. *Feres* v. *United States, supra,* 340 U.S. at 142–143. The same is, of course, true with respect to the federal prisoner, whose remedy under the Act, if any, would depend upon the law of the State to which the Attorney General has chosen to send him. *Berman* v. *United States,* 170 F. Supp. 107, 109 (E.D.N.Y.); *Van Zuch* v. *United States,* 118 F. Supp. 468, 472 (E.D.N.Y.); *Sigmon* v. *United States,* 110 F. Supp. 906, 911 (W.D. Va.).

Although recognizing that the applicability of state law in Tort Claims Act suits must necessarily lead to a lack of uniformity in the standards to which the federal prison system is subjected, the court below simply concluded that Congress had made its choice by causing the *lex loci delicti* to govern suits under the Act: "[I]nconsistency in the results has no special application to prisoners. It will occur in any class of suits brought under the Act" (R. 36; see also R. 36–38). That approach, of course, begs the very question

that must be decided here. Where, as here, Congress has expressed a strong, clear policy that the federal prison system be conducted in a uniform, federally controlled manner, one cannot infer a purpose to have that policy undermined by subjecting the system to the divergent tort laws of the several States.

III. A HOLDING THAT THE TORT CLAIMS ACT APPLIES TO PRISONER CLAIMS WOULD SUBJECT THE FEDERAL PRISON SYSTEM TO UNWARRANTED JUDICIAL SUPERVISION

Implicit in this Court's holding in *Feres* v. *United States,* 340 U.S. 135, that the Federal Tort Claims Act is not applicable to military claims was a recognition that, because of its unique and complex character, the internal management of the military establishment should not be subject to interference by the judiciary. Precisely the same considerations dictate the conclusion that, because the litigation of prisoner claims would inject the courts into the day-to-day administration of the federal penal system, such claims should not be recognized under the Tort Claims Act.

It has been accurately observed that "[t]he organization and administration of correctional institutions and agencies is one of the more complex areas of public administration and deals with one of the most involved of social problems." 1960 Proceedings, American Correctional Association, Declaration of Principles XI, p. 486. The chief distinguishing characteristic of prison administration is that, to a greater

extent than even the military establishment, it must concern itself with every aspect of the lives of those to whom it ministers; there is almost nothing that the penal institution does in relation to the persons committed to it which is not a matter of internal management.

This circumstance alone creates administrative problems of unparalleled magnitude and complexity. It is further complicated by the fact (not present in the military context to any significant degree) that "[p]risoners conventionally react by a hostile attitude toward the institution and all its activities" (Sutherland & Cressey, *Principles of Criminology* (6th ed. 1960), pp. 501, 540); they have no loyalty to it and, once integrated into prison life, no sympathy for its objectives (*id.* at pp. 505–506). These problems are further aggravated by the intense concentration of criminal personalities in the prison population.[16]

The combination of these elements—the necessity of regulating every aspect of the inmate's life and the characteristic resistance by inmates to every facet of such regulation—presents administrative problems so extreme and unusual that the federal courts, "with virtual unanimity" (Note, 72 Yale L.J. 506, 508), have concluded that they should refrain from exercising supervision over the internal management of the

[16] In 1958, for example, more than 66 percent of federal prisoners confined for sentences in excess of one year had records of one or more previous institutional commitments. 1958 Ann. Rep. Att'y Gen. 354.

federal prison system.[17] They have recognized that the conditions of penal confinement, subject to the requirements of the legislature and the Constitution,[18] are the exclusive responsibility of those designated by Congress to administer the prison system.[19]

At the heart of the judicial restraint in this area, is, no doubt, a recognition that the conduct of prison authorities cannot be measured against the standards which judges are accustomed to apply to other segments of the community. This Court suggested the problem in the *Feres* case when it noted that there is no analogy between the soldier-superior relationship and the private relationships with which the courts

---

[17] *E.g.*, *Banning* v. *Looney*, 213 F. 2d 771 (C.A. 10), certiorari denied, 348 U.S. 859; *Stroud* v. *Swope*, 187 F. 2d 850, 851 (C.A. 9), certiorari denied, 342 U.S. 829; *Garcia* v. *Steele*, 193 F. 2d 276 (C.A. 8); *Sturm* v. *McGrath*, 177 F. 2d 472 (C.A. 10); *Numer* v. *Miller*, 165 F. 2d 986 (C.A. 10); *United States ex rel. Collins* v. *Heinze*, 219 F. 2d 233 (C.A. 9); *Henson* v. *Welch*, 199 F. 2d 367 (C.A. 4); *Adams* v. *Ellis*, 197 F. 2d 483 (C.A. 5); *Williams* v. *Steele*, 194 F. 2d 32 (C.A. 8); *Powell* v. *Hunter*, 172 F. 2d 330 (C.A. 10); *Sarshik* v. *Sanford*, 142 F. 2d 676 (C.A. 5).

[18] See, *e.g.*, *Sewell* v. *Pegelow*, 291 F. 2d 196 (C.A. 4); *Fulwood* v. *Clemmer*, 206 F. Supp. 370 (D.D.C.); Note, 110 U. of Pa. L. Rev. 985.

[19] It should be noted that the federal prison system is subject to a considerable degree of scrutiny from Congress and from within the Executive Branch. Continuing oversight is maintained by the Subcommittee on National Penitentiaries of the Senate Judiciary Committee. Moreover, there is a prisoner grievance system (known as the "Prisoner's Mail Box") under which complaints may be sent by the prisoners, free of any sort of censorship, to the Director of the Bureau of Prisons, the Attorney General, the Parole Board, the Surgeon General, federal judges, and Department of Justice officials. Bureau of Prisons, Manual Bulletin No. 96 (1944), p. 10.

ordinarily deal. *Feres* v. *United States, supra;* 340 U.S. at 141–142. Even less is there an analogy between the problems of penal administration and those of everyday life. The lack of judicial competence to deal expertly with those problems is, we think, illustrated by the claims involved in this case.

It is difficult to imagine an area more inappropriate for judicial supervision than the problem of maintaining security and internal order in a prison; and yet the complaint in the *Muniz* case would require the courts to undertake just such supervision.[20] The negligence alleged—failure to provide sufficient guards, improper classification and segregation of prisoners within the prison population, and inadequacy of procedures to meet violence (see p. 3, *supra*) —goes to the most vital details of custodial control, a matter which judges are simply not equipped to evaluate. For example, the guard-prisoner ratio for a given activity or facility is determined by prison administrators on the basis of what must frankly be viewed as a calculated risk—a fine balancing between the likelihood of violence or escape and the advantages for prisoner rehabilitation to be gained from minimum

---

[20] As the dissenting judges point out (R. 48–49), the court below rendered a full opinion in the *Winston* case, basing its decision on the fact that "'it is hornbook tort law' that patients can recover for * * * negligent [medical] treatment" (R. 31, n. 7), and then disposed of the *Muniz* case with a *per curiam* order citing its *Winston* opinion, without discussing the question whether claims such as those presented in the *Muniz* complaint are ordinarily cognizable under the tort law applicable to private persons.

security.[21] Classification and segregation programs involve similarly subtle judgments, as well as such complex considerations as the relationship at any given time between the makeup of the prison population and the space available in the various categories of penal facilities. And perhaps nothing calls more urgently upon the special training, experience and sound discretion of prison officers than the development of emergency procedures for handling violence and disorders. We believe that the unwisdom of litigating these problems, and of having the courts pass judgment upon the manner in which those charged with the administration of the prison system have resolved them, is obvious.

While superficially the claim in the *Winston* case—negligent diagnosis and failure to treat on the part of prison medical personnel—might seem to be within the general area of judicial competence, the apparent analogy to recognized concepts of tort liability is deceptive.[22] The fact is that a prison hospital cannot be judged by the standards applicable to civilian hospitals. The practice of medicine in a prison is per-

[21] In fiscal 1961, there were 239 escapes from federal institutions, almost all of which were from minimum security programs. 1961 Ann. Rep. Att'y Gen. 371. According to the Bureau of Prisons, "[W]e believe our few escapes are a small price to pay for what prisoners gain as a result of our placing a reasonable trust in them when we can, and by our employing as many as possible in prison camps or on institution farms and other outside-the-walls work projects" (*Federal Prisons, 1946*, p. 18).

[22] We note that two of the military claims which the Court held to be outside the scope of the Tort Claims Act in *Feres* v. *United States*, *supra*, were claims based on allegedly negligent medical care.

vasively complicated by requirements of security and internal order. In the interests of effective treatment, custodial restrictions are somewhat less rigid in hospital facilities than elsewhere; they are thus obvious targets for escape-minded inmates. Medical supplies and equipment can be stolen and put to all manner of illicit uses, from the consumption of narcotics, stimulants and intoxicants to the fashioning of weapons or escape tools out of surgical instruments.[23] In order to avoid these problems, medical personnel must be on guard to detect feigned illnesses by which prisoners seek unwarranted access to hospital facilities, and they must constantly function not only as physicians and technicians, but as custodians as well.

It seems scarcely open to question that to allow courts to pass upon Tort Claims Act suits by prisoners would interfere with the administration of the federal prison system.[24] Whatever standard of due care the judges see fit to adopt will be bound to affect the manner in which prison officials perform their duties, whether or not it comports with their best judgment as to what is dictated by sound penal policy. Indeed, it is not difficult to foresee the possibility of retrogression in penal policy as a result of judicial supervision. For example, if an enlightened program of minimum security for trustworthy prisoners is viewed by a few judges as involving negligent lax-

[23] As a recent example: On December 16, 1962, two prisoners escaped from Alcatraz Island using water wings made of surgical rubber gloves and surgical tubing.

[24] We discuss the impact of prisoner claim coverage upon prisoner discipline in the following section (see pp. 37–41, *infra*).

ity in discipline and security—a possibility by no means fanciful—prison officials may see no alternative to returning to the sterner disciplinary methods of the past.

Moreover, the litigation in open court of the details of prison administration could well pose a serious threat to prison security. For example, where (as in the *Muniz* case) it is contended that the number of guards was insufficient to meet a particular situation and that the procedures for dealing with disorders were inadequate, much information would have to be brought out in the open—either through discovery or at trial—that might later be used to support some plan of violence or escape, such as the details of anti-riot plans, the size and assignments of the custodial staff, the procedures for recalling members of the staff in an emergency, etc. Since there is no aspect of prison life that does not involve problems of prison security, any suit in which the details of prison administration are in issue would be a potential source of useful intelligence for designing prisoners.

Finally, the burden on the prison authorities to defend against such suits would be substantial. It is predictable that they would be filed in considerable numbers, for in every prison there are "litigious and contentious individuals most of whose waking hours are devoted to the planning and preparation of writs, suits, and demands for investigations" (*Federal Prisons, 1947,* p. 22); others could be expected to bring suit to satisfy grudges against prison authorities or other prisoners or simply out of a desire for

some excitement to relieve the boredom of prison life. No matter how lacking in good faith the prisoner's claim may be, the prison authorities would be subject to discovery procedures and, in all probability (since it is only in rare cases that summary judgment can be granted on an allegation of negligence, see *Berry* v. *Atlantic Coast Line*, 273 F. 2d 572 (C.A. 4)), to trial.[25] They would then be forced to litigate the very details of internal management that the courts have consistently declined to consider.[26] Such a burden could not but have an adverse effect upon the efficiency and effectiveness of prison administration.

We do not believe these conclusions are undermined by the fact, emphasized by the court below, that some States have permitted prisoners to bring suit for negligent treatment incident to their confinement (R. 5, 30–31).[27] The only State allowing suits for such injuries against the State itself

---

[25] Judge Kaufman aptly asked: "Will prison guards, like traffic policemen, spend a substantial portion of their time in courts as witnesses * * *?" (R. 49, n. 12).

[26] See note 17, *supra*.

[27] There seems to be no basis for the lower court's apparent conclusion (R. 31, n. 7) that a prisoner could bring suit under the Tort Claims Act irrespective of whether the State whose law applies recognizes prisoner suits against custodial authorities. The Act prescribes liability "in the same manner and to the same extent as a private individual under like circumstances" (28 U.S.C. 2674). As the Court observed in *Feres* v. *United States*, *supra*, 340 U.S. at 142, to "ignore the status of both the wronged and the wrongdoer" would be to "consider * * * only a part of the circumstances," whereas "the liability assumed by the Government here is that created by 'all the circumstances,' not that which a few of the circumstances might create."

appears to be New York,[28] and there the remedy is subject to significant limitations: suit cannot be brought until the prisoner is released (*Green* v. *New York*, 278 N.Y. 15, 14 N.E. 2d 833), and the statute of limitations is tolled during his incarceration for no more than five years (N.Y. Civ. Pract. Act, Sec. 60(3)). These limitations tend to discourage the filing of claims that are not in good faith and to reduce the problems of prison administration and discipline that would be posed by allowing suits to be prosecuted during incarceration.

The other suits against State custodial authorities cited by the court below involved the personal liability of a sheriff or marshal for negligent care of prisoners in local jails. But the considerations that might justify judicial intervention in the operation of a local jail, where prisoners are held temporarily or for a short term, do not necessarily apply to an integrated correctional system, with a large permanent population of long-term prisoners; for example, suits against jailers will generally be instituted after release, thus reducing problems of administration and discipline. In fact, the few cases that have considered the liability of officials of a State prison system for negligent injury have denied the prisoner's right to sue. *O'Hare* v. *Jones*, 161 Mass. 391, 37 N.E. 371; *Carder* v. *Steiner*,

[28] The opinions in the court below cited an unreported 1948 Illinois Court of Claims case as indicating the acceptance of such liability on the part of that State (R. 35, 53). Our research has disclosed nothing about Illinois practice in this regard.

225 Md. 271, 170 A. 2d 220; cf. *Golub* v. *Krimansky*, 185 F. Supp. 783 (S.D.N.Y.).

Reconciliation of the seemingly conflicting objectives of any modern penal system—confinement and discipline, on the one hand, and rehabilitation and treatment, on the other—is difficult at best for the most highly trained prison administrators. *E.g.*, Sykes, *The Society of Captives* (1958), pp. 17–18. Judicial scrutiny of that process is bound to jeopardize its success. It would be unreasonable to suppose that Congress intended the federal penal system to be subjected to such supervision by the courts through prisoner suits under the Tort Claims Act.

IV. TO PERMIT SUIT UNDER THE TORT CLAIMS ACT WOULD INTERFERE WITH PRISONER DISCIPLINE

In concluding that Congress could not have intended to authorize suits by military personnel under the Federal Tort Claims Act, *Feres* v. *United States*, 340 U.S. 135, this Court was concerned with "the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits * * * were allowed for negligent orders given or negligent acts committed in the course of military duty," see *United States* v. *Brown* 348 U.S. 110, 112. The requirements of discipline in a prison system are no less essential to the achievement of penological objectives than is military discipline to the achievement of military objectives. The threat to prison discipline posed by the possibility of Tort Claims Act suits by prisoners for actions by their custodians is just as extreme

as any results that might obtain in the military context.

Of course, prison order and security demand a high degree of discipline—a discipline that must reach into every corner of the prisoners' lives, for apparently innocuous acts can acquire grave significance in prison:

> Pepper stolen from the mess-hall may be used as a weapon, to be thrown in the eyes of a guard during a bid for freedom. A prisoner growing a moustache may be acquiring a disguise to help him elude the police once he has gotton on the other side of the wall. Extra electrical fixtures in a cell can cause a blown fuse in a moment of crisis. A fresh coat of paint in a cell may be used by an industrious prisoner to cover up his handiwork when he has cut the bars and replaced the filings with putty. [Sykes, *The Society of Captives* (1958), p. 21.]

Moreover, the accomplishment of rehabilitative goals also requires the maintenance of firm discipline; as two leading writers on penology have pointed out (Sutherland & Cressey, *Principles of Criminology* (6th ed. 1960), p. 475):

> An inmate who, while in prison, learns that he can use brute strength, lying, cheating, and stealing to get what he wants from other inmates certainly would not be on the road to rehabilitation. Similarly, poor disciplinary control which permits inmates to use fraud and other crimes to obtain goods, services and privileges which the prison and society deny them cannot be conducive to the rehabilitation of men who have been sentenced to prison pre-

> cisely because they obtained such things in an illegal manner while on the outside. * * *

However, effective prison discipline is extremely difficult to achieve and maintain—infinitely more difficult than military discipline. We have noted the hostility that prisoners typically feel against the prison system and even its worthy objectives (see p. 29, *supra*); naturally enough, that hostility tends to focus upon the most immediate target: the administrators of the prison regime (see Sutherland & Cressey, *supra*, at p. 501). This hostility, combined with the other brooding circumstances of penal confinement, produces a state of tension that can explode abruptly into violence at the slightest provocation, even in the most enlightened institutions. See MacCormick, *Behind the Prison Riots*, 293 Annals 17 (1954). It is in this volatile atmosphere that prison administrators must achieve and maintain strict discipline—and do so almost solely on the strength of their personal relationships with the inmates, since corporal punishment has been abolished in the federal penal system and most other sanctions are relatively mild to an individual already suffering complete isolation from society.[29] See Sutherland & Cressey, *supra*, at pp. 480–481.

The accomplishment of this delicate task of effective prison discipline would be made very much more

---

[29] These institutional sanctions are also to be contrasted with the violent penalties the inmate society attempts to impose on its members, ranging from social ostracism and debasement to physical injury and death. See Korn & McCorkle, *Criminology and Penology* (1959), p. 526.

difficult if prisoners were free to harass their custodians with Tort Claims Act suits. Such suits—which, as we have noted (see pp. 34–35, *supra*), would be easy to bring and maintain irrespective of their merit—would be tailor-made to nourish the basic hostility that makes prison discipline so difficult. They would be directed at the central objects of that hostility—the custodial and administrative personnel of the prison—and they would tend to break down the personal relationships on which prison discipline, and in turn the ultimate objectives of the penal system, so greatly depend.

Inevitably, the authority of a prison official who is entangled in litigation with a prisoner is undermined. The prisoner "has" something on the official which he can hold up to his fellow inmates to demonstrate the weakness of their guardians. Even if the suit is not ultimately successful, the prisoner will probably have forced his custodians to submit to discovery, won for himself an enviably diverting ride to court, caused his custodians to have to defend their administrative actions in court and perhaps even had the opportunity to question his guards on the witness stand. Such consequences could not help but have a seriously adverse effect upon prison discipline.

Moreover, any disciplinary measure imposed upon a litigating prisoner, however justified, is likely to be considered by the inmate population as a form of retaliation. The same kind of resentment could sweep through the inmate population if the government should prevail on the merits of claims the

prisoners sincerely consider to be meritorious. Thus, litigation under the Tort Claims Act could contribute greatly to the tension of the prison atmosphere and the burden of correctional officers.

There remains the problem, too, that disciplinary conduct itself may well provide a basis for prisoner suits under the Act. The court below opined that "there can * * * be no question of the courts' reviewing affirmative acts of discipline or providing, through the possibility of resort to the courts, an incentive for resistance by prisoners" (R. 36), because of the fact that intentional torts are not cognizable under the Act.[30] That does not, however, dispose of the point. Disciplinary acts and programs would still be open to the complaint that they had been negligently carried out, leaving a very promising "incentive for resistance by prisoners" and a grave inhibition upon the freedom of action required by prison personnel in dealing with disciplinary problems.

In short, the unrelenting problem of maintaining effective discipline in the prisons would be seriously aggravated if prisoners could hale guards and prison officials into court under the Tort Claims Act to answer for their administrative conduct—including their disciplinary acts. The implications of this are so extreme, we submit, as to preclude an inference that Congress intended the Act to encompass such claims.

---

[30] As we have noted (see p. 39, *supra*), corporal punishment is not used to discipline prisoners in the federal penal system.

CONCLUSION

On several occasions, this Court has held that the extension of tort liability into areas not expressly considered by Congress should not be accomplished by judicial action. Thus, in refusing to infer a right to indemnity in the United States against an employee whose negligence had resulted in the imposition of Tort Claims Act liability (*United States* v. *Gilman*, 347 U.S. 507), the Court noted the complex problems presented by the relations between the United States and its employees, and in particular the impact of such a right upon employee discipline, morale and efficiency and upon public administration (347 U.S. at 509–510). The Court went on to observe (347 U.S. at 511–513):

> Here a complex of relations between federal agencies and their staffs is involved. Moreover, the claim now asserted, though the product of a law Congress passed, is a matter on which Congress has not taken a position. It presents questions of policy on which Congress has not spoken. The selection of that policy which is most advantageous to the whole involves a host of considerations that must be weighed and appraised. That function is more appropriately for those who write the laws, rather than for those who interpret them. [Footnote omitted.]

See also *United States* v. *Standard Oil Co.*, 332 U.S. 301, 316; *Feres* v. *United States*, 340 U.S. 135, 138.

These considerations apply with their fullest force to the question whether the unique relationship between federal prisoners and the United States should

be complicated by the availability of Tort Claims Act suits for injuries incident to confinement. The only body capable of resolving the whole range of problems that such a possibility would present is the legislature. Perhaps Congress will one day wish to adopt something comparable to the New York practice of allowing prisoner suits but of minimizing the threat to prison administration and discipline by postponing the right to sue until release. Perhaps Congress will find that experience under the present prisoner compensation scheme for work-incurred injuries points the way for further expansion to cover other categories of injuries. Perhaps Congress will choose to leave matters as they have stood under a line of federal decisions which was unbroken prior to the entry of the decision below. These and other alternatives are all open to the legislature. But until Congress has given express consideration to the kind of remedy prisoners should have, the courts, we believe, are not justified in attributing to it an intent that federal prisoners have a remedy under the Federal Tort Claims Act. The judgments below should be reversed.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

JOHN W. DOUGLAS,
Acting Assistant Attorney General.

J. WILLIAM DOOLITTLE,
Assistant to the Solicitor General.

MORTON HOLLANDER,
HOWARD E. SHAPIRO,
Attorneys.

MARCH 1963.

APPENDIX

The Federal Tort Claims Act, as amended, 28 U.S.C. 1346 and 2674, provides in pertinent part:

28 U.S.C. 1346.

• • • • •

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

• • • • •

28 U.S.C. 2674.

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

U.S. GOVERNMENT PRINTING OFFICE: 1963